82 - 1824

No.

In The
Supreme Court of The United States

October Term, 1982

ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,

v.

RAYMOND F. DREYER,
ROBERT K. CLUNIE, and
NADINE M. CLUNIE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 18, 1983

No.

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Supreme Court of The United States

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ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,
v.
RAYMOND F. DREYER,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 18, 1982, upon which rehearing was denied on January 20, 1983.

QUESTION PRESENTED

Does existence of a state-fixed, long-settled custodial status, as a necessary underlying fact in a federal diversity parental kidnapping tort action, absolutely deny to a United States District Court subject matter jurisdiction?

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The memorandum Opinion of the Court of Appeals (unpublished) and the Order of the District Court for the District of Arizona (unpublished) appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 18, 1982. A timely petition for rehearing *en banc* was denied on January 20, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). Defendant parties other than named Respondents[1] Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie in the lower court proceedings are herewith abandoned by Petitioners. Review is sought solely with respect to Respondents Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 28:

§1332, *Diversity of Citizenship.....*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different states....

STATEMENT OF THE CASE

In June, 1980, respondents Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie conspired to remove sixteen-year-old Serisa Lynn Hirschfeld from the lawful custody of her father, petitioner Robert A. Hirschfeld, in violation of a long-settled and uncontested custody decree by which Robert Hirschfeld had continuously been sole custodian of his two children since 1975. Respondents transported Serisa from Arizona to California without her father's knowledge or consent, and concealed her whereabouts from him.

After their acts of parental kidnapping and custodial interference, respondents later attempted to legitimize their unlawful taking of the child, and sought to escape both civil and criminal liability by seeking in the "asylum" state of California an ex-parte custody modification to the former Mrs. Hirschfeld, respondent Nadine M. Clunie. The "cover-up", after-the-fact state action relied upon false and perjured allegations by respondents, and is the subject of a still pending appeal in the courts of California, the outcome of which is unrelated to petitioner's settled and unchallenged status as sole custodian at the time of respondent's initial tortious acts.

Based upon respondent's acts, in removing his daughter from his lawful custody in Arizona before the subsequent attempted custody modification, petitioner Robert Hirschfeld filed a diversity action in the U.S. District Court in Phoenix, Arizona, alleging child enticement, conspiracy to interfere with lawful custody, and the intentional infliction of severe emotional distress.

The gravamen of petitioner's complaint was a prayer for substantial compensatory and punitive damages. While the "cover-up" attempted California modification action was independently challenged in California courts, the federal complaint included ancillary prayer for injunctive relief in the nature of *habeus corpus*, for the physical return of Serisa to her father. Petitioner also sought to enjoin then-pending actions by three California judges who were named as defendants, but whose now-affirmed dismissal as parties for absolute judicial immunity is not challenged herein.[1]

Serisa Hirschfeld attained her majority during the federal appeal below; thus, the injunctive relief is now moot, is severable from the remaining tort action, and is not at issue herein. The federal diversity tort action did not seek any District Court adjustment or modification of state-fixed parent-child status.

The District Court dismissed the entire matter with respect to the three respondents herein, citing the Ninth Circuit's position that diversity subject matter jurisdiction is nonexistent in any federal action "*involving* child support or child custody." (emphasis added)

The Court of Appeals, in a Memorandum Opinion, affirmed the entirety of the District Court's dismissal. The Ninth Circuit panel was aware of successful diversity parental kidnapping tort cases in which subject matter jurisdiction had been assumed by courts in the Second, Fourth, Fifth, Seventh and D.C. Circuits. Despite the fact that several such cases had proceeded through trial, award of substantial damages and affirmance, the Ninth Circuit panel ruled:

"*In this circuit*, the federal courts *must* decline jurisdiction under the domestic relations exception '*when the primary issue concerns the status of parent and child or husband and wife.* (citations)' The domestic relations exception cannot be circumvented by pleading an independent tort." *See* p.1 of Appendix hereto.(emphasis added)

A petition for rehearing *en banc* was denied.

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n.1 The parties to the proceeding before the Ninth Circuit were Robert A. Hirschfeld and William D. Hirschfeld, Appellants, and Nadine M. Clunie, Robert K. Clunie, Raymond F. Dreyer, the Hon. Charles Gordon, the Hon. Read Ambler and the Hon. Eugene Premo, Appellees.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO PROPER INTERPRETATION OF 28 U.S.C. §1332.

The federal diversity statute, 28 U.S.C. §1332, is based upon the Constitution's Article III Section 2 grant of federal jurisdiction to "controversies... between citizens of different states." Neither the diversity statute nor the Constitution contain any express jurisdictional exceptions; however, a federal judicial policy of abstention has gradually evolved in cases where the federal court finds that it would usurp the traditional role of state courts in creating and modifying spousal and parent-child relationships.

In the recent *Acord v. Parsons*, 551 F.Supp. 115 (D.C. W.D. Va., 1982), for example, a district court temporarily abstained from proceeding in a tort case involving parental kidnapping, to give a state domestic relations court an opportunity to order a future custodial relationship. Since the state court's order would not affect the parent-child relationship existing at the time prior tortious acts cognizable by the federal court had been committed, the *Acord* court retained subject matter jurisdiction of the tort case, in order to proceed after there was no longer the possibility of interference with the state court's deliberations.

Acord is the most recent in a series of parental kidnapping tort cases in which courts in the Second, Fourth, Fifth, Seventh and D.C. Circuits have acknowledged the existence of diversity subject matter jurisdiction, proceeded through trial and in some cases affirmed substantial damage awards. *Kajtazi v. Kajtazi*, 488 F.Supp. 15 (D.C. E.D. N.Y. 1978), *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980), *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982), 518 F.Supp. 720 (D.C. E.D. Wis. 1981), *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982), cert. den. ---U.S.---, Supreme Court No. 81-2152 (1982), *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982).

A judge-made federal policy of abstention relating to federal granting of marriage or divorce decrees, or of child custody status, is based in the federal district courts and courts

of appeal upon various interpretations of Supreme Court dicta in *Barber v. Barber*, 62 U.S. 582, 16 L.Ed. 226 (1859), *In re Burrus*, 136 U.S. 586, 10 S.Ct. 850 (1890) and *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930). The prevailing view among the circuits is that the Domestic Relations Abstention Doctrine is discretionary, and should be applied in specific cases where specialized state domestic relations courts would be much better suited to deal with the issues than would a federal court. Discretionary abstention implies that a federal court declines to hear a case of which the federal court has subject matter jurisdiction.

But the Ninth Circuit in the instant case, relying upon a series of prior Ninth Circuit cases in other areas peripherally involved with domestic relations status as a factual basis, has taken the extreme position that *it has absolutely no subject matter jurisdiction by virtue of a matter's "involvement"* with domestic relations. The fundamental misconception held by the Ninth Circuit has no statutory basis, and cannot logically stand concurrently with the clear acceptance of subject matter jurisdiction in the other circuit courts of appeals.

More important than a logical inconsistency, the Ninth Circuit's denial of the existence of subject matter jurisdiction is an inter-circuit conflict which may promote among parental kidnappers a pernicious new aspect of the interstate domestic-relations "forum shopping" in which such scofflaws engage: "Circuit Shopping." So long as some federal circuits remain safe havens from diversity tort liability for absconding parents, while others entertain tort actions, there may be increased flow within and between the "safe haven" federal circuits. Congress correctly assessed, in the *Parental Kidnapping Prevention Act of 1980* (PKPA)[2] that an epidemic of interstate parental kidnapping is occurring, and that state domestic relations courts of limited jurisdiction cannot effectively deal with the typical kidnapper's flight across state and sometimes international boundaries.

The federal diversity tort action against a parental kidnapper may be more effective than a state civil long-arm suit in the state from which the child was taken, or a suit in the possibly defendant-biased state to which the child has been taken. Federal judgments are more likely to be enforceable

than state judgments against the state-hopping or nation-hopping defendant. For this important federal mechanism to be effective, however, there must be consistency regarding parental kidnapping diversity cases among the federal circuits.

Establishing non-marital or non-familial duties, breach of duty, causation, damage and remedies among former spouses, according to *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980)[3] does not require any "rule particularly marital in nature." The opinions in *Lloyd, Wasserman, Bennett and Acord,* Supra, have relied on *Cole's* viewpoint in proceeding with tort claims involving duties owed not only by un related persons, but by non-custodial ex-spouses as well. The Ninth Circuit's position, however, permits not only the ex-spouse, whose duty not to unlawfully kidnap a child, not to interfere with lawful custody, and not to inflict mental distress is unrelated to the prerogatives of state domestic relations courts, to escape

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n2. Congress' intent in Public Law 96-611, the **Parental Kidnapping Act of 1980**, 94 Stat. 3568-73, was stated as follows:
"Section 7(a) The Congress finds that-
(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation under the laws, and in the courts, of different states....;
(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given to the decisions of such disputes by the courts of other jurisdictions are often inconsistent and conflicting;
(3) those characteristics of the law and practice in such cases, along with the limits imposed by a federal system on the authority of each jurisdiction to conduct investigations and take other action outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to seizure, restraint, concealment and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and
(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians."

liability: the Ninth Circuit's policy unreasonably protects conspiring tortfeasors over whom state domestic relations courts have no jurisdiction, and over whom the state has no domestic relations interest.

To permit some circuits to exercise jurisdiction and other circuits to deny the existence of that same jurisdiction creates therefore more than a logical anomaly: it may contribute to the successful abduction of hundreds of thousands of children from state-decreed lawful custodians, and thwart one of the basic purposes of diversity jurisdiction in providing a federal forum in "controversies.... between citizens of different states." Such conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO INVOKE FEDERAL DIVERSITY JURISDICTION.

Nowhere is the federal judiciary's role more beneficial than matters in which one state's courts, alone, lack effectiveness. Because parental kidnapping is nearly always an interstate activity, and because state domestic relations courts have limited contempt and other enforcement powers across state lines, the victims of parental kidnappings often are obliged to seek more effective remedies. One of those remedies, a tort action, may be more effective if litigated under federal diversity jurisdiction than in state court, because of more likely execution of federal judgments. Thus, as increasing numbers of aggrieved parents seek such relief in a federal forum, it is likely that the question of subject matter jurisdiction will recur until resolved authoritatively by the highest Court. Without Supreme Court guidance, federal

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n3. "A district court may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged.... So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart....the claims asserted could have arisen between strangers, and certainly between people with no marital relationship whatever." **Cole v. Cole**, Supra.

circuits will apparently continue to interpret ancient dicta independently, reaching inconsistent conclusions.

Existence of subject matter jurisdiction is an issue which may be raised at any stage in the proceedings, in trial courts or courts of appeal, because such existence is fundamental to continuance of the judicial process. Jurisdiction may not be created nor waived by the court or the parties; it either exists or it does not in a given case, independent of abstention policies or a court's desire to reduce its caseload.

Temporary abstention to the exercise of jurisdiction by a federal court may be deemed desirable, but abstention itself should be reserved for only those matters in which clear value can be shown in deferring to a state court. *See Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959)[4] .

Even before *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) mandated that federal courts be bound in diversity cases by applicable state law, federal courts had routinely determined under state law whether spousal immunity existed, or the existence of a spousal or parent-child status in a wrongful death action. Contrary to the Ninth Circuit position, federal cognizance of a settled, state-established domestic relationship has long been within the ordinary competence of federal courts. To permit the instant Ninth Circuit decision to stand may encourage an even more broadly construed carving-away of diversity subject matter jurisdiction in the Ninth and other circuits.

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n4. While the Supreme Court in **Thibodaux**, Supra, deemed a temporary abstention appropriate to allow a state court to first resolve a question of state law, Mr. Justice Brennan wrote in his dissent at 31-44:

"To order these suitors out of the federal court and into a state court....passes beyond disrespect for the diversity jurisdiction to plain disregard for this imperative duty. The doctrine of abstention, in proper perspective, is an extraordinary and narrow exception to this duty, and abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships."

This Court should finally resolve, to prevent recurring discrepancies in interpretation, whether any anomalous, non-statutory exception may be created as a matter of circuit-by-circuit judicial policy, with respect to cases factually "involving" state-fixed domestic relations status. There is a substantial need to enlighten all federal circuits as to whether the Ninth Circuit's position is valid, or whether 28 U.S.C. §1332 may be interpreted literally to grant federal courts jurisdiction concurrent with that of state courts "in *all* civil actions..." in which diversity and amount in controversy requirements are satisfied.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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April 18, 1983

APPENDIX

FILED
Oct. 18 1982
Phillip B. Winsberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. HIRSCHFELD, individually, and WILLIAM D. HIRSCHFELD, a minor by and through his father and sole custodian, Robert A. Hirschfeld, Plaintiffs-Appellants, v. NADINE M. CLUNIE (EX-HIRSCHFELD), ROBERT K.CLUNIE, her husband, RAYMOND F. DREYER, attorney individually and as Officer of the Courts of California, The Hon. Charles GORDON, individually and as Judge of Santa Clara County, CA Superior Court, The Hon. READ AMBLER, individually and as Judge of Santa Clara County, CA Superior Court, and The Hon. EUGENE PREMO, individually and as Judge of Santa Clara County, CA Superior Court, Defendants-Appellees.	)	No. 81-5502 D.C. No. CIV 81-9 PHX CAM MEMORANDUM

Appeal from the United States District Court
For the District of Arizona
The Honorable Carl A. Muecke, Presiding
Argued and Submitted September 9, 1982
Before: HUG, FERGUSON, and CANBY, Circuit Judges.

Robert Hirschfeld and his son filed this action for damages and injunctive relief against his ex-wife, her husband, their attorney, and three California Superior Court judges for their

actions involving the custody of Hirschfeld's daughter. Diversity of citizenship was alleged as the basis for federal jurisdiction. The district court dismissed on the ground that it lacked jurisdiction under the domestic relations exception to diversity jurisdiction, and further held that the judges enjoyed immunity from the claim for damages. We affirm.

In this circuit, the federal courts must decline jurisdiction under the domestic relations exception "when the primary issue concerns the status of parent and child or husband and wife." *Csibi v. Fustos*, 670 F.2d 134, 137 (9th. Cir 1982) *quoting Buechold v. Ortiz*, 401 F.2d 371, 372 (9th. Cir. 1968). The domestic relations exception cannot be circumvented by pleading an independent tort. *Csibi*, 670 F.2d at 138.

All of Hirschfeld's diversity claims are dependent upon a determination of the proper custody of his daughter. Even his claims for child enticement and mental distress cannot be litigated independent of the custody determination. It is clear that the "primary issue" in this case concerns the status of parent and child, and this case therefore falls within the domestic relations exception to diversity jurisdiction.

To the extent that Hirschfeld has attempted to allege claims of conspiracy on the part of the state judges in violation of the federal Civil Rights Laws, his claims are based entirely on the judges' decisions in the custody dispute. The judges are immune from suit arising from their judicial activity unless they act in the clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978); *O'Neil v. City of Lake Oswego*, 642 F.2d 367 (9th Cir. 1981). Hirschfeld has alleged no facts that would deprive the state judges of their immunity here.

The judgment of the district court is AFFIRMED.

FILED
Jan. 20 1983
Phillip B. Winoberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. HIRSCHFELD, individually, and WILLIAM D. HIRSCHFELD, a minor by and through his father and sole custodian, Robert A. Hirschfeld, Plaintiffs-Appellants,	)No. 81-5502
v.	)D.C. No.
NADINE M. CLUNIE (EX-HIRSCHFELD), ROBERT K. CLUNIE, her husband, RAYMOND F. DREYER, attorney individually and as officer of the Courts of California, The Hon. CHARLES GORDON, individually and as Judge of Santa Clara County, CA Superior Court, The Hon. READ AMBLER, individually and as Judge of Santa Clara County, CA Superior Court, and The Hon. EUGENE PREMO, individually and as Judge of Santa Clara County, CA Superior Co ırt, Defendants-Appellees.	)CIV 81-9 PHX CAM)MEMORANDUM

Appeal from the United States District Court
For the District of Arizona
The Honorable Carl A. Muecke, Presiding
Argued and Submitted September 9, 1982

Before: HUG, FERGUSON, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED
Jun 10 1981
W.J. Furstenau, Clerk
United States District Court
For the District of Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT A. HIRSCHFELD, et.al.,	)	No. CIV 81-9
Plaintiff,	)	PHX CAM
vs.	)	
NADINE M. CLUNIE, et.al.,	)	
Defendant.	)	ORDER
	)	

Having received and considered defendants' motions to dismiss plaintiff's amended complaint and plaintiff's responses thereto, and having entered an Order on April 22, 1981, requiring the parties to submit supplemental briefs on the issue of subject matter jurisdiction, and having considered said briefs and having considered the arguments of plaintiff at oral argument on June 8, 1981, this Court finds and concludes as follows:

1. Plaintiff's claim for damages against the defendant judges is barred by the doctrines of *Stump v. Sparkman*, 98 S.Ct. 1099 (1978) and *O'Neil v. City of Lake Oswego*, ---F.2d ---, 79-4123 & 24 (9th Cir. April 20, 1981).

2. All other claims in this matter should be dismissed for the reason that this Court lacks jurisdiction over the subject matter by virtue of this matter's involvement with child support and child custody. *See* cases cited in this Court's Order of April 22, 1981. *See also, Bacon v. Bacon* 373 F.2d 316 (2nd Cir. 1967).

3. This Court specifically rejects plaintiff's contention that the Parental Kidnapping Act of 1980 confers jurisdiction on this Court under the circumstances presented in this case.

Therefore,

IT IS ORDERED that plaintiff's Complaint is dismissed, each party to bear its own costs.

DATED this 9th. day of June, 1981.

C.A. Muecke, Chief Judge